Chan Yoke Chin v Official Assignee (representing the property of Yap Sin Guan, a bankrupt) & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO S2(S4)–21–83 OF 1999
KAMALANATHAN RATNAM J
22 MAY 2000

Land Law — *Sale of land — Private treaty — Delay in complying with two previous order for sale — No satisfactory explanation given — Lack of consent to sale by private treaty due to termination of settlement arrangement — Whether third application for order for sale by private treaty should be allowed*

The plaintiff was a co-owner of a property which was charged to the second defendant. The second defendant had agreed to the plaintiff's proposal that the property be sold by way of private treaty. On 7 January 1997, the plaintiff made an application and obtained an order for sale of the property by way of private treaty. However, the plaintiff was unable to effect the sale within the six months' period as ordered by the court. Thus the plaintiff made a second application which was granted on 30 March 1998. The sale and purchase agreement was only signed by all parties on 13 November 1998. By letter dated 21 April 1999, the second defendant granted an extension of four months (expiring on 21 August 1999) to the plaintiff to pay the balance sum. The letter stated that the plaintiff was to obtain a court order in respect of the extension of time. The plaintiff did not take any steps to apply to court for an extension of the second order dated 30 March 1998 to be able to comply with the terms as stated in the letter dated 21 April 1999 and within the time frame granted by the second defendant in the letter. Since as of 21 August 1999, the plaintiff had not complied with the terms of the letter, the second defendant terminated the settlement arrangement. The plaintiff made a third application in almost similar terms as sought in the earlier two applications except that in this application the plaintiff was also asking for an order for the extension of the sale and purchase agreement dated 13 November 1998.

Held, dismissing the application:

(1) The tardiness of the plaintiff in respect of the other two applications prevented the court from exercising its discretion to give her another order for sale. The plaintiff had given no reason nor any satisfactory explanation why she did not move in respect of the two earlier orders given (see p 40G).

(2) With the termination of the settlement arrangement, there was no longer any consent available from the second defendant to the plaintiff to proceed with the sale by private treaty in respect of the charged property anymore. Therefore it remains for the second defendant to proceed to enforce the charge by way of foreclosure proceedings to sell the charged property by public auction. There was now no basis for the plaintiff to file this third application since

A the consent of the chargee for a sale by private treaty was a pre-requisite (see p 41E–F).

[Bahasa Malaysia summary

Plaintif adalah pemilik bersama suatu hartanah yang telah digadaikan B kepada defendan kedua. Defendan kedua telah bersetuju dengan cadangan plaintif bahawa hartanah tersebut dijual dengan cara perjanjian persendirian. Pada 7 Januari 1997, plaintif telah membuat permohonan dan memperoleh perintah untuk penjualan hartanah tersebut melalui perjanjian persendirian. Namun, plaintif tidak dapat melaksanakan penjualan tersebut dalam tempoh enam bulan seperti C yang diarahkan oleh mahkamah. Oleh itu plaintif membuat permohonan kedua yang telah diberikan pada 30 Mac 1998. Perjanjian jual beli hanya ditandatangani oleh semua pihak pada 13 November 1998. Melalui surat bertarikh 21 April 1999, defendan kedua telah memberikan perlanjutan selama empat bulan (luput pada D 21 Ogos 1999) kepada plaintif untuk membayar jumlah baki. Surat tersebut menyatakan bahawa plaintif mestilah memperoleh perintah mahkamah berkenaan dengan perlanjutan masa. Plaintif tidak mengambil sebarang langkah-langkah untuk memohon kepada mahkamah untuk perlanjutan perintah kedua bertarikh 30 Mac 1998 agar dapat mematuhi terma-terma seperti yang dinyatakan di dalam E surat bertarikh 21 April 1999 dan di dalam tempoh masa yang diberikan oleh defendan kedua di dalam surat. Oleh kerana mulai 21 Ogos 1999 plaintif tidak mematuhi terna-terma surat tersebut, defendan kedua menamatkan aturan penyelesaian tersebut. Plaintif telah membuat permohonan ketiga di dalam terma-terma yang hampir sama seperti yang dipohon di dalam dua permohonan yang F terdahulu kecuali di dalam permohonan ini plaintif juga meminta perintah untuk perlanjutan perjanjian jual beli bertarikh 13 November 1998.

Diputuskan, menolak permohonan tersebut:

G (1) Kelewatan plaintif berkenaan dengan dua permohonan yang lain menghalang mahkamah daripada melaksanakan budi bicara untuk memberikannya suatu perintah jualan yang lain. Plaintif tidak memberikan sebab atau sebarang penjelasan yang memuaskan mengapa beliau tidak berganjak berkenaan dengan dua perintah yang terdahulu (lihat ms 40G).

H (2) Dengan penamatan aturan penyelesaian tersebut, tidak terdapat lagi sebarang persetujuan yang terbuka daripada defendan kedua kepada plaintif untuk memulakan jualan melalui penjualan secara perjanjian persendirian berkenaan dengan hartanah yang digadaikan. Oleh itu ia adalah terpulang kepada defendan kedua I untuk mula menguatkuasakan gadaian melalui prosiding penutupan untuk menjual hartanah yang digadaikan dengan lelong awam. Tiada dasar bagi plaintif untuk memfailkan permohonan ketiga ini oleh kerana persetujuan pemegang

gadaian untuk jualan melalui perjanjian persendirian adalah pra-syarat (lihat ms 41E–F).]

Notes

For cases on sale by private treaty, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 3111–3112.

Cases referred to

Chung Khiaw Bank Ltd v Lau Ah Yen & Anor [1989] 2 MLJ 247 (refd)
United Malayan Banking Corp Bhd v Chong Bun Sun & Anor [1994] 2 MLJ 221 (refd)

Legislation referred to

National Land Code 1965 ss 256, 257, 258, 259, 260, 261, 262, 263, 264, 265

Wong Kok Yih (Darshan Chong & Co) for the plaintiff.
Sutha Krishnasamy (Ghani & Co) for the defendant.

Kamalanathan Ratnam J:

Facts

The plaintiff is the wife of one Yap Sin Guan ('Yap'). Both are co-owners of premises known as No 8, Jalan Awan Cempaka Satu, Overseas Union Garden, off Jalan Klang Lama, Kuala Lumpur ('the property'). Yap has been adjudicated a bankrupt on 23 March 1989 by the second defendant to whom the said property has been charged. The first plaintiff wrote numerous letters to the first defendant to obtain his consent as the official assignee to sell the said property by way of private treaty since June 1996 but to date the first defendant has not given his consent. Even the second defendant's numerous letters to the first defendant has elicited no response.

In the meantime, to resolve the impasse the second defendant wrote a letter dated 15 January 1997 to the plaintiff stating that the second defendant had agreed to the plaintiff's proposal of a composite payment of RM175,000, whereby RM5,000 would be paid in two instalments and the balance of RM170,000 would be paid after selling the property by way of private treaty.

On 7 January 1997 by way of Originating Summons No S5–25–28–96 ('the first application'), the plaintiff obtained an order for sale of the said property by way of private treaty. Notwithstanding the fact that the first defendant was absent, the court gave the first defendant the consent to sell, on behalf of Yap, his half share of the said property by way of private treaty. However, it was expressly ordered by the court that the sale by private treaty ought to be effected within six months from the date of the said order and that all proceeds from the said sale ought to be handed to the second defendant in full settlement of the balance due.

Since the plaintiff was unable to effect the sale by way of private treaty within the said six months the plaintiff made a second application by way of Originating Motion No S4–21–167–97 ('the second application'). On 30 March 1998, the court made an order compelling the first defendant to give his consent for the sale by private treaty of the said property at a price of RM170,000 to one Kok Ken Seng. It was further ordered that if the first defendant failed to sign the sale and purchase agreement within three months from the date of the order, the senior assistant registrar of the High Court ('the SAR') be empowered to sign the sale and purchase agreement on behalf of the first defendant. It was further ordered that the entire proceeds of the sale be paid to the second defendant in settlement of the loan arising out of the said charge and it was finally ordered that the sale by private treaty ought to be effected within six months of the date of the said order.

The sale and purchase agreement was only signed by all parties and in respect of the first defendant by the SAR Kuala Lumpur on 13 November 1998. In the meantime, the purchaser, Kok Ken Seng, was only able to obtain a loan of only RM136,000 from the Malayan Banking Bhd to finance the purchase on 25 February 1999. Notwithstanding the delay, the second defendant, by way of a letter dated 8 March 1999 said as follows:

> Please be informed that our clients are agreeable to your client's request for extension of time to pay to our clients the said composite sum of RM170,000 provided the purchaser pay to our clients an upfront of RM34,000 (refundable free of interest) being the difference of the loan amount of RM136,000 and composite sum of RM170,000 on or before 16 March 1999.

The plaintiff was only able to send the said sum of RM34,000 by way of a letter dated 18 March 1999 and which said letter was received by the second defendant's solicitors on 22 March 1999. The second defendant's solicitors' reply letter dated 21 April 1999 reads as follows:

> (1) Our clients are agreeable in granting your clients an extension of four months from 21 April 1999 (expiring on 21 August 1999) to fully settle the balance sum of RM136,000.
>
> (2) In this respect our clients have reinstated the composite sum of RM175,000 as full and final settlement in the matter herein.
>
> (3) The sum of RM34,000 which was forwarded by your clients will be part of the composite settlement sum, and the said sum is non-refundable for whatever reason.
>
> (4) Your clients are to obtain a court order in respect of the extension of time.
>
> (5) The above is without prejudice to our clients' rights to recover the full amount outstanding and to treat the composite settlement as cancelled in the event of non compliance by your clients of the abovementioned terms.

The application

This is now the plaintiff's third application in almost similar terms as sought in the earlier two applications except that in this application the plaintiff is

also asking for an order for the extension of the sale and purchase agreement dated 13 November 1998.

Findings of the court

It is the plaintiff's case that since she is old and without money she could not afford to apply for a court order as directed by the second defendant. Instead the plaintiff wrote two further letters dated 22 April 1999 and 3 May 1999 to the first defendant seeking his consent for the sale by private treaty. Finally, the first defendant wrote to the plaintiff's solicitors on 7 July 1999 informing them that their application was being processed and that they would be notified of the outcome. The plaintiff is no doubt aware that there is an application already pending by the second defendant seeking an order for sale of the said property by way of Suit No S3–21–123–95.

Non response by the official aAssignee (OA)

I am at a loss to understand why the OA has been unresponsive. It would seem that even in respect of the first two earlier applications the OA never even bothered to attend court notwithstanding the fact that the applications were served on him. In fact it became even necessary for the plaintiff to have even obtained an order from the SAR to sign in place of the OA if he failed to sign the sale and purchase agreement within three months. And sure enough the OA did not sign the sale and purchase agreement, thus requiring the SAR to do the work of the OA. And finally the plaintiff wrote two letters dated 22 April 1999 and 3 May 1999 and it took the OA another two months to merely state that the application was being processed. This state of affairs must be put right. The OA has not even seen it fit to explain his lack of response in this matter, to the court.

However, the plaintiff's failure to obtain a court order for the consent which was a pre-requisite put paid to this application. If the plaintiff has the money now to make this application the plaintiff ought to have done so promptly when she received the letter dated 21 April 1999.

The delay

The tardiness of the plaintiff in respect of the other two applications prevents this court from exercising its discretion to give her another order for sale. The plaintiff has given no reason nor any satisfactory explanation why she did not move in respect of the two earlier orders given. The plaintiff has delayed the completion of the sale of the charged property by way of a private treaty since 7 January 1997 when the first order was made. The plaintiff's explanation that the first defendant had failed to reply has been taken care of by the plaintiff, by obtaining an order that the SAR should sign the sale and purchase agreement in place of the OA. Then the plaintiff explains the delay in the signing of the sale and purchase agreement on 13 November 1998 by stating that this was due to the delay in the extraction of the draft and the fair order. It would seem to me that the plaintiff is blaming everyone else except herself. If what the plaintiff is stating is true that there was a delay in the extraction of the draft and the fair order, the

A plaintiff has made no effort to show what steps she took to expedite their extraction. Surely her solicitors could have seen the learned SAR concerned to explain the position and then she could have obtained the signed and sealed order in a day. These delays have not helped the plaintiff and in any case no satisfactory explanation has been given.

B The termination

In my view, the terms of the second defendant's solicitors' letter dated 21 April 1999 are important. The plaintiff did not take any steps to apply to court for an extension of the second order dated 30 March 1998 to be able to comply with the terms as stated in the letter dated 21 April 1999 and C within the time frame granted by the second plaintiff in the said letter dated 21 April 1999.

Therefore since as of 21 August 1999 (as stated in the said letter dated 21 April 1999), the plaintiff had not complied with the terms of the said letter, the second defendant, by its letter dated 3 September 1999 D 'terminated the composite settlement arrangement of RM175,000 with immediate effect ...' pursuant to cl 5 of the letter dated 21 April 1999. In fact by their solicitors' letter dated 19 Augsut 1999 the second defendant reminded the plaintiff of her obligations as stated in the second defendant's letter dated 21 April 1999.

E It is conclusive therefore that with the said termination of the composite settlement arrangement, there is no longer any consent available from the second defendant to the plaintiff to proceed with the sale by private treaty in respect of the said charged property anymore. It remains therefore for the second defendant to proceed to enforce the charge by way of foreclosure proceedings to sell the charged property by public auction. There is now no F basis for the plaintiff to file this third application before me, since the consent of the chargee for a sale by private treaty, is a pre-requisite. In fact in *Chung Khiaw Bank Ltd v Lau Ah Yen & Anor* [1989] 2 MLJ 247, Wan Adnan J (as the learned Chief Judge (Malaya) then was) held that ss 256–259 and ss 260–265 of the National Land Code 1965 contemplate a sale by public auction only and that the court has no power to order a sale by G private treaty under any of these sections (see also *United Malayan Banking Corp Bhd v Chong Bun Sun & Anor* [1994] 2 MLJ 221). However, in the *United Malayan Banking* case the court held that 'a chargor may, before an order for sale has been made and with the consent of the chargee, sell the charged property by way of private treaty'. It is therefore settled law that the plaintiff chargor can only sell the charged property by way of private treaty H with the consent of the second defendant/chargee.

As for the sums paid so far, the plaintiff is at liberty to raise this when the second defendant moves the court for sale by public auction. In so far as this application goes, it stands dismissed with costs.

I *Application dismissed.*

Reported by Jafisah Jaafar